

Comments

EU Directive on Copyright in the Digital Single Market: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections

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Introduction

“HAS THE EU KILLED THE OPEN INTERNET?”¹ “#SaveYourInternet,”² and similar headlines emerged when the European Union (“EU”) approved the EU Directive on Copyright in the Digital Single Market³ (“DSM Directive”), reforming copyright law as the world knew it and arguably requiring Internet providers to take direct responsibility for copyrighted material that is shared unlawfully on their platforms.⁴ This is a shift that has arguably obliterated safe harbor protections.

The presumption against governments imposing direct liability on online platforms for user-uploaded content encourages user-free expression and platform innovation and is often credited with facili-

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1. Sebastian Schaub, *Article 13: Has the EU Killed the Open Internet?*, TECHRADAR (Apr. 12, 2019), <https://www.techradar.com/news/article-13-has-the-eu-killed-the-open-internet> [<https://perma.cc/GUV6-JA58>].

2. *The #SaveYourInternet Fight Against Article 17 [ex. Art. 13] Continues*, #SAVEYOURINTERNET, <https://saveyourinternet.eu> [<https://perma.cc/KE5P-4J5E>].

3. Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on Copyright and Related Rights in the Digital Single Market and Amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130) [hereinafter DSM Directive].

4. *Id.* art. 17(3); *see generally infra* Part II(A)(1) (discussing how the DSM Directive has changed copyright law to increase the direct liability of service providers).

tating the expansion of the Internet.⁵ However, the expansion of technology in the digital age, coupled with contrasting approaches of Internet service provider liability, has led to new complications in achieving cross-border harmonization of copyright protection. While this Comment discusses the DSM Directive, it is limited in scope, specifically to Article 17 (proposed as Article 15), regarding Internet service provider liability for hosting user-generated or user-created content and the shift from an intermediary liability (reactive) regime to intermediary responsibility (proactive) regime.

Part I provides an overview of the current copyright framework of the United States, the recent change in regulations in the EU, and the corresponding contrasting approaches to Internet intermediary liability. Part II critiques the implications of the DSM Directive for blurring the line between passive and active Internet providers and the problem with the EU's purported value gap as the justification for the enhanced liability imposed on intermediaries. Additionally, Part II critiques the EU's seemingly mandated technological measures in order to comply with the "notice-and-staydown" directive as an approach inconsistent with the EU *acquis*⁶ and evaluates Article 17's impact on fundamental rights, freedom of expression, and business innovation. Part II also highlights the fragmentation of legal rules when comparing the EU Copyright system with other copyright regimes around the globe. Lastly, Part III proposes that the EU repeal Article 17 of the DSM Directive and reinstate Article 14 of the Electronic Commerce Directive ("E-Comm. Directive") while incorporating amendments and clarifications in order to retain a semblance of harmonization at a global level and to represent the interests of all participants in the digital single market.

I. The United States and the European Union: Copyright Laws for Online Service Providers

Since the late-1990s and the expansion of the Internet, legislatures have provided safe harbors to online intermediaries, exempting them from direct liability when their users post infringing content,

5. Klint Finley, *The Internet's Safe Harbor Just Got a Little Less Safe*, WIRED (Aug. 17, 2016), <https://www.wired.com/2016/08/internets-safe-harbor-just-got-little-less-safe> [<https://perma.cc/EG6T-72B3>] ("It's hard to overstate the importance of the DMCA's safe harbor provision to the growth of the early Internet In short, the DMCA . . . has enabled the explosion of online speech over the past two decades.")

6. See *infra* note 109 (defining the EU's '*acquis*' as "the body of common rights and obligations that are binding on all EU countries, as EU Members").

provided the service provider meets certain requirements. This was exemplified in the 1998 Digital Millennium Copyright Act⁷ in the United States and both the 2000 E-Comm. Directive⁸ and the 2001 Information Society Directive⁹ (“InfoSoc Directive”) in the EU. Each of these actions were seemingly on the same page, granting online service providers (“OSP(s)”) and other Internet intermediaries a “safe harbor” from liability when users uploaded copyright infringing content on their public platforms, as long as the provider neither had actual knowledge nor received notice sufficient to constitute knowledge.¹⁰ The seemingly similar approaches to intermediary liability changed when, in 2015, the European Commission announced its Digital Single Market Strategy, which presented legislative steps towards “A Digital Single Market Strategy for Europe.”¹¹ After years of negotiations surrounding the Digital Single Market Strategy, in 2019, the EU approved and implemented the DSM Directive, reforming the copyright structure and giving EU Member States¹² until June 2021 to transpose the reforming regulations into national law.¹³

A. Counter Notifications and Safe Harbor Protections Under the United States’ Digital Millennium Copyright Act

The Digital Millennium Copyright Act (“DMCA”) of 1988 was implemented in the United States in an attempt “to balance the interests

7. Digital Millennium Copyright Act, Pub. L. No. 105-304, 112 Stat. 2860 (1998) (codified as amended in scattered sections of 5, 17, 28, and 35 U.S.C.).

8. Directive 2000/31, of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market (Directive on Electronic Commerce), 2000 O.J. (L 178) [hereinafter E-Comm. Directive].

9. Directive 2001/29, of the European Parliament and of the Council of 22 May 2001 on the Harmonisation of Certain Aspects of Copyright and Related Rights in the Information Society, 2001 O.J. (L 167) [hereinafter InfoSoc Directive].

10. See E-Comm. Directive, *supra* note 8, art. 14(1). See also 17 U.S.C. § 512(c)(1)(a)(i)–(ii) (2020).

11. See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions: A Digital Single Market Strategy for Europe*, at 11–12, COM (2015) 192 final (May 6, 2017), § 3.3.2; see generally Giancarlo F. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 Nw. U. L. REV. 18, 21–23 (2017) (discussing in detail the European Commission’s plans to achieve the new digital single market).

12. Note that the United Kingdom will not adopt the DSM Directive after Brexit. James Vincent, *The UK Won’t Implement EU’s Controversial Copyright Directive After Brexit*, VERGE (Jan. 27, 2020, 5:51 AM), <https://www.theverge.com/2020/1/27/21083295/eu-copyright-directive-uk-brexite-no-implementation> [<https://perma.cc/WC56-XA55>].

13. See DSM Directive, *supra* note 3, art. 29(1) (requiring Member States to enact the laws necessary to comply with the Directive by June 7, 2021).

of Internet service providers and copyright owners when copyright infringement occurs” on a digital platform.¹⁴ It established a safe harbor provision,¹⁵ which grants OSPs, among other Internet intermediaries, exemption from copyright infringement liability after meeting certain statutory requirements.¹⁶ The protection only applies if the content uploaded is a transitory communication initiated by a person other than the service provider¹⁷ and “is transmitted through the system . . . without modification of its content.”¹⁸ The DMCA establishes a notice-and-takedown procedure,¹⁹ which imposes a requirement that the OSP “expeditiously [] remove, or disable access to, the material”²⁰ upon obtaining notice from the rightsholder that identifies and locates the content.²¹ The notice-and-takedown system allows rightsholders to unilaterally censor their content on the Internet without the use of judicial oversight.²² This is a strong right to have considering owners do not have such a right in other instances.²³ The system also represents user rights once their content is “claimed” and taken down because it allows the alleged infringer to file a counter-notification stating grounds for why the content does not infringe a protected right.²⁴

As an illustration of the above, imagine a YouTube²⁵ user uploads content to the YouTube platform that infringes a copyrighted work. Under this current U.S. copyright law, the rightsholder of the work sends a take-down notice to YouTube and YouTube becomes liable

14. *Digital Millennium Copyright Act: Overview*, HARV. UNIV., <https://dmca.harvard.edu/overview> [<https://perma.cc/LQ3U-HQ47>].

15. 17 U.S.C. § 512(a) (2020).

16. “[T]he term ‘service provider’ means any entity offering the transmission, routing, or providing of connections for digital online communications, between or among points specified by a user, of material of the user’s choosing, without modification to the content of the material as sent or received.” *Id.* § 512(k)(1)(A).

17. *Id.* § 512(a)(1).

18. *Id.* § 512(a)(5).

19. *Id.* § 512(c)(3)(A)(i)–(vi).

20. *Id.* § 512(c)(1)(A)(iii).

21. *Id.* § 512(c)(3)(A)(ii)–(iii).

22. Cory Doctorow, *How the EU’s Copyright Filters Will Make It Trivial for Anyone to Censor the Internet*, ELEC. FRONTIER FOUND. (Sept. 11, 2018), <https://www EFF.ORG/deeplinks/2018/09/how-eus-copyright-filters-will-make-it-trivial-anyone-censor-internet> [<https://perma.cc/X3XN-PCFZ>].

23. For example, an individual cannot walk into a movie theater and declare ownership of a movie currently playing to shut the movie down.

24. 17 U.S.C. § 512(g).

25. “YouTube is a video sharing service where users can watch, like, share, comment and upload their own videos.” *Explained: What Is YouTube?*, WEBWISE, <https://www.webwise.ie/parents/what-is-youtube/> [<https://perma.cc/3FV7-U9U2>].

only when the content in the take-down notice is not removed in a reasonable amount of time.²⁶ YouTube then notifies the alleged infringing user, and the user has a right to send a counter-notification demonstrating that the content does not actually infringe any protected copyright.²⁷ After ten to fourteen days following the user's counter-notification, the user's content is restored on the platform unless the complainant files an order in court against the individual user and submits proof to the service provider.²⁸ The DMCA protects the OSP from direct liability, not the individual users on the system who may infringe a copyright, which is shown in YouTube's policy where it provides that one's account may be terminated for repeat infringements.²⁹ It is clear from the statutory scheme in the United States that the rightsholder carries the burden of policing copyright infringing content, and an OSP acts as an intermediary between the user and the rightsholder, responsible only to the provided notices.

B. The European Union's Regulatory Framework for Copyright Liability

The EU's regulatory framework for copyright legislation contains eleven Directives³⁰ and two regulations "that [harmonize] essential rights of authors and of performers, producers and broadcasters."³¹ Since 2000, both the E-Comm. Directive and the InfoSoc Directive (specifically their safe harbor provisions) have been the foundation of Internet regulation in the EU. The E-Comm. Directive created safe harbor exemptions for service providers who engage in "mere conduit,"³² "caching,"³³ and "hosting,"³⁴ followed by an express provision

26. 17 U.S.C. § 512(g)(2)(A).

27. *Id.* § 512(g)(3).

28. Mr. DMCA Helper, *What Is a DMCA Counter Notice?*, DMCA.COM (Nov. 18, 2011), <https://www.dmca.com/faq/What-is-a-DMCA-Counter-Notice> [https://perma.cc/K4K2-7FKA].

29. 17 U.S.C. § 512(i)(1)(A).

30. *The EU Copyright Legislation*, EUROPA: EUR. COMM'N (June 27, 2019), <https://ec.europa.eu/digital-single-market/en/eu-copyright-legislation> [https://perma.cc/N5YX-MJU8]. "Directives require EU countries to achieve a certain result, but leave them free to choose how to do so. EU countries must adopt measures to incorporate them into national law in order to achieve the objectives set by the directive." See *Types of EU Law*, EUROPA, https://ec.europa.eu/info/law/law-making-process/types-eu-law_en [https://perma.cc/TY7U-357C].

31. *The EU Copyright Legislation*, *supra* note 30.

32. E-Comm. Directive, *supra* note 8, art. 12(1).

33. *Id.* art. 13.

34. *Id.* art. 14.

that there is no general obligation for OSPs to monitor the information that is transmitted or stored.³⁵

Similar to DMCA safe harbor provisions, Article 14(1) of the E-Comm. Directive states that a “hosting” service provider is not liable for content stored by a recipient so long as the service provider “does not have *actual knowledge* . . . or is *not aware of facts or circumstances*” that makes the storage apparently illegal, or the service provider “acts expeditiously to remove or disable access to the information” upon becoming aware.³⁶ This exemplifies a reactive system of copyright enforcement, “knowledge” being the trigger for the provider to take action, like its DMCA counterpart. The InfoSoc Directive further mirrors the DMCA safe harbors by protecting temporary acts of reproduction, “which are transient or incidental [and] integral and essential” to transmissions that are only transmitted through an intermediary in a network between third parties.³⁷ What was missing from the E-Comm. and InfoSoc Directives as compared to their U.S. counterpart, however, was the ability for the EU user to submit a counter-notice when the user, in good faith, believed their material was wrongfully removed.

The EU’s approach to online content sharing service providers³⁸ (“OCSSP(s)”) changed profoundly when, after years of negotiations and lobbying by tech giants, copyright holders, and digital rights activists, the European Parliament passed the DSM Directive with 348 votes in support of and 274 against the proposal, which effectively transformed the notice-and-takedown system to a notice-and-staydown system.³⁹ The most controversial article in the DSM Directive is Article 17 (formerly Article 13 during the Directive’s negotiations),⁴⁰ which

35. *Id.* art. 15.

36. *Id.* art. 14(1)(a)-(b) (emphasis added).

37. InfoSoc Directive, *supra* note 9, art. 5(1)(a).

38. DSM Directive, *supra* note 3, art. 2(6) (throughout this comment, OSP and OCSSP shall be used interchangeably).

‘Online content sharing service provider’ means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organizes and promotes for profit-making purposes.

Id.

39. Natasha Lomas, *European Parliament Votes for Controversial Copyright Reform (Yes, Again)*, TECHCRUNCH (Mar. 26, 2019, 6:53 AM), <https://techcrunch.com/2019/03/26/european-parliament-votes-for-controversial-copyright-reform> [https://perma.cc/9MHB-FY2G].

40. Cory Doctorow, *As the German Government Abandons Small Businesses, the Worst Parts of the EU Copyright Directive Come Roaring Back, Made Even Worse*, ELEC. FRONTIER FOUND.

purports to clarify the liability following an OCSSPs' use of copyright protected content by attempting to close the value gap between Internet platforms and rightsholders.⁴¹

In a notice-and-staydown system, rightsholders send digital copies of their protected work to online platforms, and the platforms then build "copyright filters" or "upload filters" that compare content the user seeks to upload with its database of known copyrights, which are then used to block any content that the algorithm matches to protected content.⁴² The DSM Directive imposes a proactive obligation to obtain licensing agreements with rightsholders and to implement measures that ensure compliance with those licensing agreements. Without authorization from a rightsholder, an OCSSP must prevent the availability of the copyright protected content or be subject to liability of copyright infringement.⁴³ So, once the rightsholder gives the OCSSP notice, in the form of a licensing agreement or otherwise, the OCSSP must not only remove infringing work(s) from every location on the platform, it must also prevent the same work from becoming available again in the future. It is a nearly impossible feat to implement and enforce such a regulation without monitoring each and every detail a user uploads or posts.

(Feb. 5, 2019), <https://www.eff.org/deeplinks/2019/01/german-government-abandons-small-businesses-worst-parts-eu-copyright-directive> [<https://perma.cc/4ZJA-C9KJ>] (demonstrating that "more than a million Europeans promptly wrote to their [Members of the Parliament] to demand that the [DSM] Directive be voted on clause-by-clause . . . and the number of Europeans opposing the Directive [] ballooned to more than four million, making the anti-Directive petition the biggest one in European history"); *see also* Letter, ASS'N OF COM. TELEVISION IN EUR. ET AL., CREATIVE SECTORS CALL FOR A SUSPENSION OF NEGOTIATIONS ON ARTICLE 13 (2019) (signed by Europe's largest and most powerful rightsholder groups ranging from the Association of Commercial Television in Europe to Premier League).

41. *See Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 31, COM (2016) 593 final (Sept. 14, 2016) [hereinafter *DSM Proposal*]. The "[r]easons for and objectives of the proposal" include "clarif[ing] the role of online services in the distribution of works and other subject-matter." *Id.* at 3.

42. Doctorow, *supra* note 22.

43. DSM Directive, *supra* note 3, art. 17(4).

II. Critiquing the European Union's DSM Directive

A. Inconsistencies and Justifications with Little Supporting Evidence

1. "Act of Communication" and "Authorization:" Blurring the Line Between Active and Passive Activity

First, it is important to note that the prior Directive, Article 3(1) of the InfoSoc Directive, provides rightsholders "with the exclusive right to authori[z]e or prohibit any communication to the public," including communications that allow the public to individually choose a place and time to access the works.⁴⁴ In conjunction with Article 3(1) of the InfoSoc Directive, service provider liability under Article 14 of the E-Comm. Directive provided a safe harbor for hosting OCSSP platforms "on the condition that the provider does not have actual knowledge of illegal activity" or, in "claims for damages, is not aware of facts or circumstances" giving rise to the illegal activity,⁴⁵ or "upon obtaining such knowledge or awareness, the provider acts expeditiously to remove or disable access to the information."⁴⁶ Further, the E-Comm. Directive establishes that safe harbor protections "shall not apply when the recipient of the service is acting under the authority or control of the provider."⁴⁷ The E-Comm. Directive framework can be categorized as a negligence regime, triggering liability of the intermediary when they have actual or constructive knowledge.⁴⁸

In contrast to Article 3(1) of the InfoSoc Directive, Article 17(1) of the DSM Directive states that a service provider "performs an act of communication to the public or an act of making available to the public . . . when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users."⁴⁹ It follows that Article 17(1) of the DSM Directive requires OCSSPs to first obtain a license from the rightsholders, referred to in Article 3(1) of the InfoSoc Directive for the OCSSP to "communicate" or "make available to the public" works that are protected, or if not, become subject to direct liability for copyright infringement of its user-posted content.

Article 17(3) of the DSM Directive explicitly and effectively repeals protection under Article 14 of the E-Comm. Directive by stating

44. InfoSoc Directive, *supra* note 9, art. 3(1).

45. E-Comm. Directive, *supra* note 8, art. 14(1)(a).

46. *Id.* art. 14(1)(b).

47. *Id.* art. 14(2).

48. Frosio, *supra* note 11, at 41.

49. DSM Directive, *supra* note 3, art. 17(1) (emphasis added).

that when an act of communication is made to the public under the conditions in the DSM directive, the protections of Article 14 of the E-Comm. Directive “shall *not* apply.”⁵⁰ This infers that a hosting OCSSP must play an “active role” to be directly liable under Article 17 of the DSM Directive. Calling it an “act of communication” and holding OCSSPs liable for direct (rather than secondary) infringement concludes that OCSSPs play an active role, rather than a passive role, in content sharing. This shift, in effect, creates a strict liability regime of OSP liability, the trigger being the mere availability of protected content on the platform, regardless of whether OCSSP exercised control over the content the individual user posted. Unless licensing agreements are in place, the DSM Directive affirms OCSSPs’ *direct* liability by disregarding the actual or constructive knowledge requirement that has been a foundation of safe harbor protections under the InfoSoc and the E-Comm. Directive for nearly two decades.

2. “Value Gap?”

Proponents of the DSM Directive argued that the reform would balance the playing field, or in other words, “close the value gap” between large American tech companies and European music creators, and give rightsholders more power over how Internet platforms distribute their content.⁵¹ The value gap, generally, is the assumption that certain advertisement-funded OSP/OCSSPs (such as YouTube and SoundCloud), as opposed to subscription-based services (such as Spotify, Netflix, and Apple Music), misuse safe harbor provisions by not obtaining licenses from the rightsholders for the works transmitted through their platforms, and that this misuse “deprive[s] rightsholders from gaining revenues they are entitled to.”⁵² The European Commission was persuaded that certain OCSSP safe harbor protections under the E-Comm. Directive had not been conducive to a “fair

50. *Id.* art. 17(3) (emphasis added).

51. See INT’L FED’N OF THE PHONOGRAPHIC INDUS., IFPI DIGITAL MUSIC REPORT 2015: CHARTING THE PATH TO SUSTAINABLE GROWTH 22–23 (2015), https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/DMR/ifpi_digital-music-report-2015.pdf [<https://perma.cc/MN9D-DC37>]; see also *Rewarding Creativity: Fixing the Value Gap*, in 24 GLOBAL MUSIC REPORT 2017: ANNUAL STATE OF THE INDUSTRY, INTERNATIONAL FEDERATION OF THE PHONOGRAPHIC INDUSTRY 24–27 (2017), https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/GMR2017_press.pdf [<https://perma.cc/4SUY-FUY2>].

52. Maria Lillà Montagnani & Alina Trapova, *New Obligations for Internet Intermediaries in the Digital Single Market – Safe Harbors in Turmoil?*, 22 J. INTERNET L. 3, 9 (2019), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3361073 [<https://perma.cc/7ULR-F8P>]; see also *Rewarding Creativity: Fixing the Value Gap*, *supra* note 51, at 24–27.

share of the value” for use of recorded music on digital platforms.⁵³ In the DSM Proposal, the Commission explicitly noted the intended redistributive effects of Article 15 (then Article 13) by stating that the proposal provides measures that seek to improve rightsholders’ bargaining power and ensures fair compensation for the exploitation of their content by OCSSPs.⁵⁴

As apparent, the European Commission has rationalized the DSM Directive by pointing to the value gap.⁵⁵ However, academic literature and empirical studies do not support the “value gap” rationale for the change the DSM Directive enacts regarding digital platforms and content providers.⁵⁶ During the DSM Directive’s negotiations, an impact assessment of the copyright reform criticized that the “economic impacts are mostly assessed from a qualitative point of view” and that because of “[t]he limited availability of data in this area,” it was unable to qualitatively assess the impacts of the different policy approaches of the proposed DSM Directive.⁵⁷

Further, the European Copyright Society issued an opinion which criticized that it is “disappointed to see that the [DSM] proposal [is] not grounded in any solid scientific (in particular, economic) evidence.”⁵⁸ The European Copyright Society went so far as to note that it is “hard to comprehend why the Commission has elected not to engage in, or commission, any specific studies on the economic rationale and possible impact” given that the Directive leads to a “completely new type of intellectual property right with obvious impact on the digital single market.”⁵⁹ From this, we see that the value gap justifi-

53. *DSM Proposal*, *supra* note 41, at 3 (explaining that it is “necessary to guarantee that authors and rightsholders receive a fair share of the value that is generated by the use of their works and other subject-matter”).

54. *Id.*

55. *Id.*

56. See Giancarlo F. Frosio, *Digital Piracy Debunked: A Short Note on Digital Threats and Intermediary Liability*, *INTERNET POL’Y REV.*, Mar. 2016, at 7, 10 (discussing empirical studies and lack of evidence “of digital music sales displacement” and noting that “[t]he conclusion that piracy may equal to promotion of copyrighted content is in line with findings of many of the studies mentioned earlier Hard data seem to suggest that the entertainment industry misperceived the internet as a threat.”); see also Frosio, *supra* note 11, at 26–29 (criticizing the value gap).

57. *Commission Staff Working Document Executive Summary of the Impact Assessment on the Modernisation of EU Copyright Rules*, at 136, SWD (2016) 301 final (Sept. 4, 2016); Frosio, *supra* note 11, at 27–28.

58. EUR. COPYRIGHT SOC’Y, GENERAL OPINION ON THE EU COPYRIGHT REFORM PACKAGE 5 (2017), <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf> [<https://perma.cc/X4UF-W9QT>]. See Frosio, *supra* note 11, at 28.

59. EUR. COPYRIGHT SOC’Y, *supra* note 58, at 5.

cation is based loosely on a fabricated assumption. As legal academic writer and professor Giancarlo Frosio notes, “[T]here is no clear and convincing evidence on the scale, nature, or effects of copyright infringement in the digital environment, or the effectiveness of more aggressive enforcement strategies.”⁶⁰

The DSM Directive is proactive in nature, treating the mere hand-off of rightsholders’ catalogs to the OSP as equivalent to *actual* notice. This is seemingly the only way to rationalize how an OSP can be held directly liable under the DSM Directive. Even if this were the case, given the massive amount of content that is uploaded to YouTube each day,⁶¹ it seems an impossible burden to expect an algorithm to efficiently filter every piece of content, let alone to accurately determine whether the uploaded content might be lawfully permissible, such as under fair use in the United States or another lawfully permitted exception to infringement like non-profit educational use.

Also, it is important to emphasize the different business models that YouTube (ad-funded) and Spotify (subscription-based) are subjected to and why the value gap is not a sufficient motivation for eliminating safe harbor protections for platforms like YouTube. Spotify is a closed distribution platform, meaning that it directly controls the entire universe of content that is provided to its subscribers.⁶² This amount of control *does* give the provider actual knowledge of the content that is available on its platform at any time. Contrast this with YouTube, where it was revealed at a press event that individual users “upload more than 500 hours of fresh video *per minute*”—that is, “30,000 hours of new content per hour, [or] 720,000 hours of new content per day.”⁶³ This makes YouTube fundamentally different from Spotify, since YouTube *does not* and *cannot* proactively have the same amount of control over content uploaded on its platform.

As noted, the European Commission grounds the DSM Directive in improving rightsholders’ bargaining power;⁶⁴ thus, it is no surprise

60. Frosio, *supra* note 11, at 28.

61. See Hale, *infra* note 63.

62. See Spotify, CRUNCHBASE, <https://www.crunchbase.com/organization/spotify#section-overview> [<https://perma.cc/U7LM-AR8W>] (describing Spotify as “a commercial music streaming service that provides restricted digital content from a range of record labels and artists”) (emphasis added).

63. James Hale, *More than 500 Hours of Content Are Now Being Uploaded to YouTube Every Minute*, TUBEFILTER (May 7, 2019), <https://www.tubefilter.com/2019/05/07/number-hours-video-uploaded-to-youtube-per-minute/> [<https://perma.cc/LF52-J7SQ>].

64. DSM Proposal, *supra* note 41, at 5.

that many proponents of the DSM Directive are rightsholders involved in the music industry and collective rights management organizations in the music sector,⁶⁵ especially since the music industry is directly impacted by companies like YouTube. However, as Martin Husovec points out, based on a lack of evidence supporting the value gap rationale, it seems what the music industry is *actually* dissatisfied with is rightsholders' inability to perfectly enforce their rights against all unauthorized uploads and, as a result, the music industry believes OSPs should compensate rightsholders with a fee equal to what the highest paying clients pay⁶⁶ (i.e. the fee that subscription based services who sell the music itself require from their users). Thus, recognizing the clear differences in OSPs' business models, it is difficult to understand why or how the value gap is a sufficient rationale for removing safe harbors and imposing mandatory preemptive licensing for ad-based services, like YouTube, when the function, awareness, and control of content on the platform is entirely different from that of a subscription-based public platform service.

B. The High Cost of Compliance

1. Upload Filtering: Encouraged or Mandated?

The proactive license-first, communicate-later approach is echoed in Article 17(4) as it “encourages” monitoring of all uploads, most likely through the use of content identification technology.⁶⁷ The DSM Directive provides that when there is failure to proactively obtain authorization from rightsholders, OSPs shall be directly liable for users' unauthorized acts of communication to the public, unless the OSP demonstrates that they have:

- (a) made best efforts to obtain authorization, and
- (b) made, in accordance with industry standards . . . , best efforts to ensure the unavailability of specific works . . . for which the rightsholders have provided the service providers with the relevant and necessary information; and in any event
- (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightsholders, to disable to, or to remove from their

65. Till Kreutzer, *The EU Copyright Directive and Its Potential Impact on Cultural Diversity on the Internet – Part I*, WOLTERS KLUWER: COPYRIGHT BLOG (Jan. 22, 2020), <http://copyright.blog.kluweriplaw.com/2020/01/22/the-eu-copyright-directive-and-its-potential-impact-on-cultural-diversity-on-the-internet-part-i/> [https://perma.cc/D9Z6-BXX9].

66. Martin Husovec, *EC Proposes Stay-Down & Expanded Obligation to License UGC Services*, HUTKO'S TECH. L. NOTES (Sept. 1, 2016, 11:22 AM), <http://www.husovec.eu/2016/09/ec-proposes-stay-down-expanded.html> [https://perma.cc/UE7H-YK5R].

67. DSM Directive, *supra* note 3, art. 17(4).

websites . . . and made best efforts to prevent their future uploads in accordance with point (b).⁶⁸

Although the law does not explicitly call for mandatory content identifying technology, “critics say it will be an inevitability as sites seek to avoid penalties”⁶⁹ since “[it is] impossible to enforce any ‘staydown’ without technologies that mark and identify copyrighted material” in order to prevent future uploads.⁷⁰ It is difficult to reconcile the E-Comm. Directive’s Article 15, which provides that there is no general obligation of a hosting OSP to monitor information transmitted by users, “nor a general obligation actively to seek facts or circumstances indicating illegal activity,”⁷¹ with the DSM Directive’s Article 17, which essentially requires content identifying technology to be implemented in order to be protected from direct liability.⁷²

To summarize, the E-Comm. Directive prohibits requiring the use of technological measures to continuously monitor uploaded content. In direct contrast, the DSM Directive now imposes that the OCSSP use ‘best efforts’ to screen every piece of uploaded content in accordance with high industry standards of professional diligence *before the content is even uploaded* to avoid direct liability. If mandatory screening of everything a user uploads before the content is posted does not amount to a general monitoring obligation, it is truly difficult to imagine what does.

2. The Impact on Fundamental Rights

For a number of reasons, fundamental rights are at stake with any imposition of mandatory content filtration systems. In particular, the Court of Justice of the European Union⁷³ (“E.C.J.”) noted that the imposed technological measures “could potentially undermine freedom of information, since that system might not distinguish ade-

68. *Id.* art. 17(4)(a)–(c).

69. James Vincent, *Europe’s Controversial Overhaul of Online Copyright Receives Final Approval*, VERGE (Mar. 26, 2019, 8:00 AM), <https://www.theverge.com/2019/3/26/18280726/europe-copyright-directive> [<https://perma.cc/CA9C-3FFH>].

70. Chris Sprigman & Mark Lemley, Opinion, *Op-Ed: Why Notice-and-Takedown Is a Bit of Copyright Law Worth Saving*, L.A. TIMES (June 21, 2016, 5:00 AM), <https://www.latimes.com/opinion/op-ed/la-oe-sprigman-lemley-notice-and-takedown-dmca-20160621-snap-story.html> [<https://perma.cc/7B7H-KUUS>].

71. E-Comm. Directive, *supra* note 8, art. 15.

72. DSM Directive, *supra* note 3, art. 17.

73. See *Court of Justice of the European Union (CJEU)*, EUROPA, https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en#what-does-the-cjeu-do [<https://perma.cc/7VXU-N9SQ>] (explaining that the E.C.J. “interprets EU law to make sure it is applied the same way throughout all EU countries”—it decides issues of Union law as a whole, not the national, individual law of member states).

quately between unlawful content and lawful content.”⁷⁴ When this inevitably occurs, information incorrectly flagged as infringing could have chilling effects on freedom of information and business.⁷⁵

In 2007, YouTube voluntarily created Content ID⁷⁶ technology in order to provide notice to rightsholders when infringing uploads occur, and to allow rightsholders to “choose in advance what they want to happen when those [uploads] are detected” (e.g. monetize by permitting ads, track viewing statistics, or block the content altogether).⁷⁷ However, the algorithm-based content recognition technology is expensive and not available to all rightsholders. Currently, “YouTube only grants Content ID to copyright owners who meet specific criteria” such as “own[ing] exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community.”⁷⁸

Is this system only protecting the rights of the rich and the famous who have created a plethora of creative works? If so, it seems the rationale of implementing these technologies does not capture all individuals who creatively express themselves and who will potentially be affected by copyright infringement. Additionally, YouTube claims to have invested over \$100 million in Content ID.⁷⁹ The sheer amount of investment that YouTube has put into the system erects barriers to business innovation, primarily because it is more expensive for other OSP platforms to enter the market. The E.C.J. has previously emphasized that such an obligation “would result in a serious infringement of the freedom of the hosting service provider to conduct its business.”⁸⁰

74. Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85, ¶ 50 (Feb. 16, 2012).

75. See *Takedown Hall of Shame*, ELEC. FRONTIER FOUND., <https://www.eff.org/takedowns> [<https://perma.cc/F2BT-VC6C>] (depicting bogus copyright and trademark complaints and discussing their threat to creative expression on the Internet).

76. *How Content ID Works*, GOOGLE: YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> [<https://perma.cc/6A23-B74V>] (explaining that Content ID works by creating a unique digital fingerprint of every uploaded user file and then using that fingerprint to query a database populated with fingerprints of reference files provided by rightsholders).

77. GOOGLE, *HOW GOOGLE FIGHTS PIRACY 24* (2018), https://www.blog.google/documents/25/GO806_Google_FightsPiracy_eReader_final.pdf [<https://perma.cc/WT4A-H7XJ>].

78. *Using Content ID*, GOOGLE: YOUTUBE HELP, <https://support.google.com/youtube/answer/3244015?hl=en> [<https://perma.cc/ZZ74-G6UJ>].

79. GOOGLE, *supra* note 77, at 13.

80. See Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85, ¶ 46 (Feb. 16, 2012).

Freedom of information can be limited when a content recognition system's algorithm cannot or does not accurately recognize information that is in the public domain. In the notice-and-takedown system in the United States, an individual posted a Google+ Hangout video session to YouTube regarding a discussion about NASA's Curiosity mission with a few video clips of the mission.⁸¹ It is well known in U.S. intellectual property that government works are generally automatically placed into the public domain,⁸² so the YouTube user was shocked when five media companies "claimed" the content through YouTube's current Content ID system.⁸³ Those media companies were permitted to "claim" the content because they had previously uploaded their own news broadcasts that contained the same public domain material in YouTube's Content ID system.⁸⁴ Thus, the user's video was enough to produce a content match, triggering takedown. In imagining a staydown system, the same video with information that should have been recognized as being in public domain, would have been blocked before it had been posted. At a large scale, it is easy to see how freedom of information is threatened by mandating content filters and imposing a proactive blocking system.

C. Notice-and-Staydown and Direct Liability: An Outlier System

It cannot go without noting that the DSM Directive represents a copyright regime that is in stark contrast with not only the United States⁸⁵ and many non-EU countries throughout the world, but also with its own Member States. Generally, throughout EU Member States and beyond, safe harbor provisions protect OSPs that host or transmit user content. OSP liability is established, if ever, based on secondary liability, emerging from principles of tort (such as negligence), and follows a notice-and-take down system or similar alternative. This section will briefly examine the copyright infringement and OSP liability structures of Canada and China, followed by EU case law and Member State approaches, to emphasize the discrepancies in the DSM Directive.

81. Timothy B. Lee, *How YouTube Lets Content Companies "Claim" NASA Mars Videos*, ARS TECHNICA (Aug. 8, 2012, 9:25 AM), <https://arstechnica.com/tech-policy/2012/08/how-youtube-lets-content-companies-claim-nasa-mars-videos/> [https://perma.cc/DR2D-2ZW3].

82. 17 U.S.C. § 105 (2020).

83. Lee, *supra* note 81.

84. *Id.*

85. *See supra* Part I.

1. Canada: Notice-Notice Regime

Canada's Copyright Act states that "[i]t is an infringement of copyright for a person . . . to provide a service primarily for the purpose of enabling acts of copyright infringement if an actual infringement of copyright infringement occurs . . . as a result of the use of that service."⁸⁶ One factor taken into account when determining copyright infringement is "whether the service has significant uses other than to enable acts of copyright infringement."⁸⁷ Section 2(2.4)(1)(b) of the Canadian Copyright Act, "[f]or the purposes of communication to the public by telecommunication," provides, "a person whose only act in respect of the communication of a work . . . to the public consists of providing the means of telecommunication necessary for another person to so communicate that work . . . does *not* communicate that work . . . to the public."⁸⁸

The Copyright Act operates as a "notice and notice"⁸⁹ regime, requiring the rightsholder to provide detailed information to the service provider when infringing content is discovered. The provider then must transmit that notice to the supposed infringing user, and retain records that will identify the supposed infringing user for a period of six months.⁹⁰ While there is no obligation to monitor content in Canada's Copyright Act, the act of receiving notice that a content provider has posted infringing material on its system and the provider's failure to take remedial action (e.g. sending a takedown notice) may allow a finding of authorized communication to the public and therefore may trigger secondary liability.⁹¹ Canada imposes secondary liability for infringement after notice has been provided, which is a direct contrast to the DSM Directive that holds providers directly liable on a proactive basis.

86. Copyright Act, R.S.C. 1985, c C-42, § 27(2.3) (Can.), <https://laws-lois.justice.gc.ca/PDF/C-42.pdf> [<https://perma.cc/U3XS-66Y3>].

87. *Id.* § 27(2.4)(c).

88. *Id.* § 2(2.4)(1)(b) (emphasis added).

89. Media & Ent. Group, *Online Infringement: Canadian "Notice and Notice" vs US "Notice and Takedown"*, ENT. & MEDIA L. SIGNAL (July 3, 2012), <http://www.entertainmentmedialaw.signal.com/online-infringement-canadian-notice-and-notice-vs-us-notice-and-takedown> [<https://perma.cc/TU5Z-UEJB>]; *see also id.* §§ 41.25–41.26.

90. R.S.C. 1985, c C-42, §§ 41.25–41.26 (Can.).

91. *See Online Infringement: Canadian "Notice and Notice" vs US "Notice and Takedown"*, *supra* note 89; *see also* Soc'y of Composers, Authors & Music Publishers of Can. v. Canadian Assn. of Internet Providers, [2004] 2 S.C.R. 427, 476, para. 124 (Can.) (stating "copyright liability may well attach if the activities of the [OSP] cease to be content neutral, e.g. if it has notice that a content provider has posted infringing material on its system and fails to take remedial action").

Further, it is unlikely that Canada will impose mandatory monitoring obligations because the United States-Mexico-Canada Agreement, signed in November 2018, recognizes that safe harbor protections “shall not be conditioned on the [OSP] monitoring its service or affirmatively seeking facts indicating infringing activity,”⁹² except to the extent consistent with technical measures that are “developed through an open, voluntary process by a broad consensus of copyright owners and service providers . . . that do not impose substantial costs on service providers.”⁹³ The DSM Directive does not interpret an act of communication like Canada does and it is not operating on an open, voluntary process. Intermediaries will likely need to find a way to handle this difference in a way that allows them to operate in both markets, which may prove costly, especially for businesses with smaller pools of resources than, for example, YouTube.

2. The People’s Republic of China: Takedown and Put Up Regime

The Republic of China has the most Internet users in the world, with 854,000,000 users total.⁹⁴ The Copyright Law of the People’s Republic of China, does not mention “communication,” instead it says an author (or rightsholder) may “authorize” another person to exercise copyright property rights and receive remuneration.⁹⁵ There has also been no findings of OSPs’ potential liability for authorizing infringement, instead, the courts in China have found intermediaries’ liable on fault-based principles such as negligence and, alternatively, on principles of joint or accessory liability.⁹⁶

In addition to the Copyright Law of the People’s Republic of China, the Regulations on the Protection of the Right of Communication through Information Network governs “[any] organization or

92. *Agreement Between the United States of America, the United Mexican States, and Canada 7/1/20 Text*, OFF. OF THE U.S. TRADE REPRESENTATIVE, art. 20.88, ¶ 7, <https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement/agreement-between> [<https://perma.cc/B7X2-354K>].

93. *Id.* ¶ 6(b).

94. *Top 20 Countries with the Highest Number of Internet Users*, INTERNET WORLD STATS (June 30, 2019), <https://www.internetworldstats.com/top20.htm> [<https://perma.cc/25RJ-VKRM>].

95. Copyright Law of the People’s Republic of China (promulgated by the Standing Comm. of the People’s Cong., September 7, 1990, amended February 26, 2010), http://english.www.gov.cn/archive/laws_regulations/2014/08/23/content_281474982987430.htm [<https://perma.cc/7D7Z-GZH4>].

96. Daniel Seng, *Copyright and Related Rights Cases in the Field of Music in the Asia-Pacific Region*, World Intellectual Property Organization [WIPO] (2011), https://www.wipo.int/edocs/pubdocs/en/copyright/1025/wipo_pub_1025.pdf [<https://perma.cc/JMJ7-PLC8>].

person that makes another person's works, performances, or sound recording or video recordings available to the public through [the] information network" in China.⁹⁷ It establishes a "notice-and-take-down and put-up" regime in which the rightsholders may provide notice with relevant information necessary to locate the infringing content and request that the content be taken down.⁹⁸ While the material must be "promptly" taken down,⁹⁹ the user may issue a put-up notice in return, in the form of a written statement that provides "primary proof" that the materials are non-infringing.¹⁰⁰ The provider must then promptly restore the materials and send the user's put-up notice to the rightsholder, who can take further action on their own.¹⁰¹

A final overview of statutory copyright infringement law in China shows that the following non-exhaustive factors are considered when determining OSP liability: (1) whether the OSP chooses the transmitted works; (2) whether the OSP alters the works; (3) whether the OSP knows or has reasonable grounds to know that the works infringe another's rights; (4) whether the OSP directly financially benefits from the provided works; and (5) whether the OSP promptly removes the work upon receiving notice.¹⁰² This Copyright system honors the fundamental rights of users more than a staydown system by immediately putting the material back up upon notice from the user and requiring the owner of the content to effectively police its copyright. It strikes a fairer balance between user rights and the commercial rights that have traditionally been enforced by rightsholders.

3. DSM Directive as Outlier to E.C.J. Case Law

As already discussed in Part II(A)(1), the DSM Directive's technological measures are difficult to reconcile with the E-Comm. Directive's "no general monitoring obligation."¹⁰³ It is additionally difficult to reconcile with E.C.J. case law on the subject. Prior to the DSM Di-

97. *Regulations for the Protection of the Right of Communication Through Information Network*, China Patents & Trademarks No. 3, 2006, Statutes & Rules, art. 2 (applying to Copyright Law in China).

98. *Id.* art. 14–17; see also Seagull Haiyan Song, *ISP Liability Under the Copyright Law Regime in China*, China Patents & Trademarks No. 4, 2010, Copyright.

99. *Regulations for the Protection of the Right of Communication Through Information Network*, *supra* note 97, art. 15.

100. *Id.* art. 16.

101. *Id.* art. 17.

102. *Id.* art. 21–22; see generally Song, *supra* note 98 (discussing these factors, among others).

103. See *supra* Part II(A)(1).

rective, case law from the E.C.J. has, in multiple instances, rejected holding OSPs directly liable and confirmed that there is no room for proactive, general monitoring and filtering mechanisms within EU copyright law.¹⁰⁴

Belgium abstained from voting on the final DSM Directive.¹⁰⁵ Despite this, the Belgian National Court heard two notable cases on copyright infringement and OSP liability.¹⁰⁶ In both cases, SABAM, a collective rights management organization, brought suit against intermediaries in order to impose a filtering system that would prevent them from making available protected works without authorization.¹⁰⁷ Similarly, in both cases, the Belgian National Court submitted preliminary questions to the E.C.J.¹⁰⁸ to clarify whether the proposed filtering mechanism was compatible with EU acquis.¹⁰⁹ The E.C.J. held in both instances that the filtering mechanism would violate principles contained within the EU acquis framework, including the InfoSoc Directive and the E-Comm. Directive, “as well as fundamental rights such as the freedom of information and the protection of personal data.”¹¹⁰

A more recent and notable case regarding making infringing content available to the public by file sharing was submitted to a Netherlands court regarding a website called The Pirate Bay, a search engine for uploading, sharing, and downloading peer-to-peer torrents.¹¹¹ In *Stichting Brein*, the question was whether The Pirate Bay

104. See Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85 (Feb. 16, 2012); see also Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, ECLI:EU:C:2011:771 (Nov. 24, 2011) (confirming service providers have “no general obligation to monitor” stored or transmitted information).

105. See #SAVEYOURINTERNET, *supra* note 2 (noting that Belgium was one of three Member States, including Estonia and Slovenia, that abstained from voting on the DSM Directive).

106. *Netlog NV*, ECLI:EU:C:2012:85; *Scarlet Extended SA*, ECLI:EU:C:2011:771.

107. *Netlog NV*, ECLI:EU:C:2012:85; *Scarlet Extended SA*, ECLI:EU:C:2011:771.

108. *Netlog NV*, ECLI:EU:C:2012:85; *Scarlet Extended SA*, ECLI:EU:C:2011:771.

109. *Glossary of Summaries: Acquis*, EUR-LEX, <https://eur-lex.europa.eu/summary/glossary/acquis.html> [<https://perma.cc/5JAE-K2FS>] (defining “[t]he EU’s ‘acquis’ is the body of common rights and obligations that are binding on all EU countries, as EU Members”).

110. See Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 2; *SABAM v. Netlog NV, Case C-360/10 Case Analysis*, COLUM. UNIV.: GLOB. FREEDOM OF EXPRESSION, <https://globalfreedomofexpression.columbia.edu/cases/ecj-sabam-v-netlog-nv-case-c%E2%80%9136010/> [<https://perma.cc/9DR4-J7ZL>].

111. *All About the Pirate Bay*, PIRATE BAY, https://thepirate-bay.org/1/#All_About_the_Pirate_Bay [<https://perma.cc/SE4T-R6WT>] (stating in subsection “All About the Pirate Bay,” “It’s controversial, as you know, but The Pirate Bay basically offers an index of online digital file sharing opportunities in the fields of music and other digital media”); Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456 (June 14, 2017).

engaged in an act of making available communication to the public by indexing and categorizing links to infringing material so that users could search, find, and share them.¹¹² The E.C.J. emphasized that an OSP is not shielded by safe harbor protection and is liable for copyright infringement if it has “full knowledge” that it manages its platform in a way which makes it easy for users to locate, download, use, upload, and share copyrighted work without authorized consent.¹¹³ The court additionally determined that The Pirate Bay went beyond merely providing services (passive) because its employees made sure works were properly classified in the appropriate genre or category by “delet[ing] obsolete or faulty torrent files and actively filter[ing] some content.”¹¹⁴

The Pirate Bay went beyond acting passively when it substantially engaged with the user-uploaded files and was subject to direct copyright infringement. In this case, the copyright liability regime effectively took down an Internet service that was *knowingly* communicating infringing content to the public without proper authorization. This is a proper analysis of copyright liability imposed on a service provider, and since the regime did not seem otherwise broken, it is difficult to understand the rationale for a change which mandates the controversial and contradictory DSM Directive.

III. Author Recommendations

Article 17 of the DSM Directive establishes a regulatory approach which contradicts EU *acquis* and non-EU copyright liability regimes around the world. It is therefore a threat not only to the EU rule of law, but also to achieving harmonization at a global level. The EU should shift its motivation toward achieving harmonization at a global level by repealing Article 17 and effectively reinstating Article 14 of the E-Comm. Directive, which established OSP safe harbors and notice-and-takedown procedures that more properly balance the fundamental rights of individual users, companies, and rightsholders. Additionally, the E-Comm. Directive should be amended to incorporate a counter-notification for when individual users believe their material was wrongfully removed. Lastly, the EU should determine a clear standard for active and passive intermediaries, rather than mak-

112. *Stichting Brein*, ECLI:EU:C:2017:456, ¶¶16–17, 48.

113. *Id.* ¶¶ 20, 36–37.

114. *Id.* ¶ 38.

ing knowledge the trigger, since that has been the subject of most litigation over OSP liability in E.C.J. case law.

The European Commission based its copyright ratification on the evolution of technology and the digital age.¹¹⁵ Rather than seeking harmonization at an internal EU level, the Commission should shift their focus on achieving a copyright liability regime that more closely harmonizes copyright law at a global level since both intellectual property and the digital age have a global reach that transcends borders.

As an additional note, all EU Member States are independent members of the United Nations.¹¹⁶ A Joint Declaration on Freedom of Expression and the Internet signed by the United Nations Special Rapporteur on Freedom of Opinion and Expression in 2011 provided that “[a]t a minimum, intermediaries should not be required to monitor user-generated content and should not be subject to . . . content takedown rules which fail to provide sufficient protection for freedom of expression.”¹¹⁷ It is difficult to reconcile the United Nations declaration with the approach of Article 17 in the EU, and this must be resolved by repealing Article 17 altogether to ensure the representation of fundamental rights.

The EU’s focus now is on balancing the commercial interests of tech companies and creative expressionists; however, it neglects the interests and rights of users who are neither the tech company nor the rightsholder. While a good compromise can leave all sides a bit disappointed, it does not entirely neglect to represent the interests of an

115. *DSM Proposal*, *supra* note 41, at 2

([t]he evolution of digital technologies has changed the way works and other protected subject-matter are created, produced, distributed and exploited. New uses have emerged as well as new actors and new business models. In the digital environment, cross-border uses have also intensified and new opportunities for consumers to access copyright-protected content have [materialized].)

Id.

116. *Member States*, UNITED NATIONS, <https://www.un.org/en/member-states/> [<https://perma.cc/9FF9-TW7N>]; *Countries*, EUROPA, https://europa.eu/european-union/about-eu/countries_en [<https://perma.cc/U7TG-GLK2>].

117. *International Mechanisms for Promoting Freedom of Expression: Joint Declaration on Freedom of Expression and the Internet*, ORG. FOR SEC. & CO-OPERATION IN EUR. (June 1, 2011), <https://www.osce.org/fom/78309?download=true> [<https://perma.cc/MF9F-32ZR>]

(signed by “[t]he United Nations (UN) Special Rapporteur on Freedom of Opinion and Expression, the Organization for Security and Co-Operation in Europe (OSCE) Representative on Freedom of the Media, the Organization American States (OAS) Special Rapporteur on Freedom of Expression and the African Commission on Human and Peoples’ Rights (ACHPR) Special Rapporteur on Freedom of Expression and Access to Information.”)

Id.

affected party. The DSM Directive is neither a good balance, nor a good compromise.

In repealing Article 17, platforms that merely make copyright-protected content available at the transmission of their users would no longer be directly liable. It is nearly an impossible burden, even for a tech giant like YouTube which has hundreds of thousands of hours of content uploaded per day, to adequately monitor each minute of the content uploaded per day. Also, imposing an obligation of costly and inaccurate content filtering technologies does no more to represent the business's interest. A reactive approach provides a better balance than proactive monitoring.

Article 14 of the E-Comm. Directive should be amended to incorporate what both the United States and the Republic of China have codified into their copyright systems—a way for the user to submit a counter-notification, which is missing from the E-Comm. Directive itself, but present in Article 17(9) of the DSM Directive. Repealing Article 17 entirely would reverse the mandated technical measures to monitor uploads, representing the interests of not only businesses, but also individual users, since their freedom of expression is protected even after someone files a notification about allegedly infringing content. When the content is restored to the platform, a user is not wrongfully deprived in the way an inaccurate content filter would block the content altogether. Rather than tipping the balance in the rightsholders favor by diminishing protection of others, the rightsholders should remain responsible for policing their own rights since they receive a copy of the counter-notification, have all the requisite information about the allegedly infringing user, and are able to further enforce with contract or litigation, if necessary.

While Article 14 of the E-Comm. Directive is not perfect as written, it does provide a better approach than Article 17 of the DSM Directive. Countries should further seek to establish a clear line between intermediaries that are passive and those that are active, since that is frequently the subject of litigation in OSP liability cases, copyright cases generally, and even other intellectual property cases.¹¹⁸

118. See generally Case C-360/10, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, ECLI:EU:C:2012:85 (Feb. 16, 2012) (OSP liability context); Case C-70/10, *Scarlet Extended SA v. Société Belge des Auteurs, Compositeurs et Éditeurs SCRL (SABAM)*, ECLI:EU:C:2011:771 (Nov. 24, 2011) (OSP liability context); Case C-610/15, *Stichting Brein v. Ziggo BV*, ECLI:EU:C:2017:456, ¶¶16–17, 48 (June 14, 2017) (copyright context); Case C-236/08, *Google France v. Louis Vuitton Malletier*, ECLI:EU:C:2010:159 (Mar. 23, 2010) (trademark context); Case C-324/09, *L'Oréal SA v. eBay International AG*, ECLI:EU:C:2011:474 (July 12, 2011) (trademark context).

Once a line is established between passive and active services, a counter-notification, or something similar, is put into place, and the “no obligation to monitor” article of the E-Comm. Directive is reinstated, the EU will be closer to achieving a more balanced copyright approach.

Conclusion

The expansion of technology and the digital age has raised concerns about sharing information online and its role in copyright infringement, leading to a globally-fragmented approach. The European Union went beyond traditional copyright law and caused an uproar with its DSM Directive, namely Article 17, which Member States must now transpose into national law next year. Not only is the justification for the DSM Directive unsupported by evidence, it is an outlier approach in the world of copyright liability and enforcement, and unduly impacts fundamental rights. Whereas Article 17 of the DSM Directive limits rights and imposes costly obligations, Article 14 of the E-Comm. Directive better balances fundamental rights and, with some slight amending, will be more in line with other copyright frameworks around the world. Thus, Article 17 should be repealed.